

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION**

PEOPLE OF THE STATE OF ILLINOIS,)
)
)
Plaintiffs,) Case Nos
) 17CR-0970001
v.) 17CR-0970002
) 17CR-0970003
DAVID MARCH,)
JOSEPH WALSH, And)
THOMAS GAFFNEY)
) Honorable Domenica A. Stephenson,
Defendants) Judge Presiding

ORDER

This case is before the Court following a bench trial for all three defendants. The Court has heard the testimony of all the witnesses, reviewed all the properly admitted exhibits, and heard the arguments of the parties.

All three defendants, David March, Joseph Walsh, and Thomas Gaffney, are charged with the offenses of conspiracy to commit official misconduct and obstruction of justice, official misconduct, and obstruction of justice.

INDICTMENT

Regarding the conspiracy charge, the indictment states that no later than October 20, 2014 and continuing thereafter, all three defendants committed the offense of conspiracy when each—with intent that the offense of official misconduct be committed and that the offense of obstructing justice be committed—agreed with each other, Individual A (now known to be Jason Van Dyke), and others known and unknown to the Special Grand Jury to the commission of the offense, and an act in furtherance of the agreement was performed by any party to the agreement.

It is further stated in the indictment, that the objective of the conspiracy was to conceal the true facts of the events surrounding the killing of Laquan McDonald (hereinafter McDonald) by Chicago Police Department Officer Van Dyke (hereinafter Van Dyke) in order to shield their fellow officer from criminal investigation and prosecution. In furtherance thereof, the co-conspirators: (1) lied about what occurred and mischaracterized the video recordings so that independent criminal investigators would not know the truth about the McDonald killing and the public would not see the video recordings of the events; (2) understood that public airing of the events surrounding McDonald's killing, including the video recordings, would inexorably lead to a thorough criminal investigation by an independent body and likely criminal charges; (3) created police reports in the critical early hours and days following the killing of McDonald that contained important false information in an attempt to prevent or shape any criminal investigation. Furthermore, all three defendants and Van Dyke were members of the Chicago Police Department who were involved in the investigation of the fatal shooting of McDonald and as members of the Chicago Police Department, all three defendants and Van Dyke, and others known and unknown to the Special Grand Jury coordinated their activities in order to protect each other and other members of the Chicago Police Department by furnishing false information, making false reports, failing to report or correct false information, ignoring contrary information or evidence, obstructing justice, intentionally or recklessly failing to perform a mandatory duty as required by law, and knowingly performing acts which each knows he or she is forbidden by law to perform.

It is further charged in the indictment that all three defendants committed the offense of official misconduct when each, being a public officer or employee in his or her official capacity, intentionally or recklessly failed to perform any mandatory duty as required by law and

knowingly performed an act which he or she knows he or she is forbidden by law to perform, incorporating all of the above allegations.

It is further charged in the indictment that all three defendants committed the offense of obstructing justice when each, with intent to prevent the apprehension, obstruct the prosecution, and obstruct the defense of any person, knowingly furnished false information, incorporating all the above allegations.

The State contends that the defendants should be found guilty of conspiracy because they furnished false information, created false reports, failed to correct or report the false information, and ignored contrary information or evidence. Essentially, the State contends that the false information or false reports consist of the following:

1. Chicago Police Detective David March (hereinafter March) told Chicago Police Officer Dora Fontaine (hereinafter Fontaine) to include false information in her original case report, specifically that: Van Dyke was injured; Van Dyke, Chicago Police Officer Joseph Walsh (hereinafter Walsh), Chicago Police Officer Thomas Gaffney (hereinafter Gaffney) and Chicago Police Officer Joseph McElligott (hereinafter McElligott) were all victims; McDonald was an offender; and the category of offense was aggravated assault (assault upon a police officer with a knife or cutting instrument).
2. A General Progress Report (GPR)¹ and statement in March's supplemental report attributed to Fontaine states "O ignored, raised R arm toward VD [Van Dyke] as if attacking VD."
3. A GPR prepared by March and attributed to Walsh states "at 12-15 ft. O swung knife at PO V in aggressive manner" and that "VD continued firing as O continued moving, attempting get up, still armed w/knife."
4. A statement in March's supplement report attributed to Walsh states "When McDonald got to within 12-15 feet of the officers he swung the knife toward the officers in an aggressive manner" and "VD continued firing his weapon at McDonald

¹ GPRs are reports completed contemporaneously by Detectives during the course of their investigation. They are used to aide in preparing subsequent reports.

as McDonald continued moving on the ground, attempting to get up, while still armed with the knife.”

5. A GPR prepared by March and attributed to Individual G (now known as PO Viramontes) states “O fell to ground but continued to move, attempting to get back up, knife still in hand.”
6. A statement contained in March’s supplemental report and attributed to Individual G (Viramontes) states “McDonald fell to the ground but continued to move, attempting to get back up, with the knife still in his hand.”
7. The supplemental report of March states “the recovered in-car camera video from 845R and 813R was viewed and found to be consistent with the accounts of all of the witnesses.”
8. The supplemental report of March also lists Van Dyke, Walsh, Gaffney, and McElligott as victims and McDonald as the offender.
9. The supplemental report of March states that “McDonald committed aggravated assaults against three officers, finally forcing VD, in defense of his life, to shoot and kill McDonald.”
10. That Van Dyke, Walsh, and Gaffney prepared and submitted virtually identical Officer Battery Reports (OBR)² and Tactical Response Reports (TRR)³ with information that they knew to be false, specifically, OBRs with “No. of officers battered: 3” and “stabbed/cut (including actual attempt).”
11. That a TRR prepared by Van Dyke indicated “assailant: assault imminent threat of battery,” “assailant: battery attack with weapon,” “assailant: deadly force uses force likely to cause death or great bodily harm,” and “VD fired his weapon in fear of his life when the offender while armed with a knife continued to approach.”
12. That TRRs prepared and submitted by Walsh and Gaffney indicated: “assailant: assault imminent threat of battery,” “assailant: battery attacked with weapon,” and “assailant: deadly force uses force likely to cause death or great bodily harm.”

² OBR is a report to be completed by the officer involved for all incidents when: (1) a sworn member is the victim of a murder, aggravated battery, battery, aggravated assault, or assault while performing a police function either on-duty or off-duty; or (2) a detention aide is the victim of a murder, aggravated battery, battery, aggravated assault, or assault while in the performance of his or her duties.

³ TRR is a report that documents a police officer’s response to a subject’s actions. The guidelines for completing a TRR are contained in General Order G03-02-05 (P. Ex. CPD Order 5).

13. That the OBRs and TRRs were reviewed and approved by supervisors.
14. That the concluding paragraph in March's supplemental reports is not supported by the videos or witness statements.
15. That March provided false information to Medical Examiner Investigator Earl Briggs, in stating that the subject lunged at the officer.

The State contends that all three defendants, Van Dyke, and others failed to report or correct the false information with the Chicago Police Department.

The State further contends that all three defendants and others, failed to locate, identify, or interview witnesses, or to ensure the location, identification, or interview of witnesses, of the shooting of McDonald—including three unnamed witnesses whose information was inconsistent with accounts of Chicago Police Department members.

The State further contends that March and others failed to locate and preserve physical evidence, or to ensure the location, identification, and preservation of physical evidence, including video and photographic evidence.

The State also asserts that all three defendants, Van Dyke, and others used various means to communicate with each other in order to coordinate the activities of the conspiracy.

The State asserts that all three defendants, Van Dyke, and others used means to misrepresent, conceal, and hide, and to cause to be misrepresented, concealed, and hidden, the activities of the conspiracy, and to avoid detection and apprehension by law enforcement authorities.

The State also asserts that all three defendants, Van Dyke, and others deleted or failed to preserve communications with each other concerning and during the activities of the conspiracy.

The State contends that all three defendants, Van Dyke, and others violated the Rules and Regulations of the Chicago Police Department and violated General Orders and Special Orders of the Chicago Police Department.

LEGAL STANDARD

A “conspiracy involves a criminal agreement to commit a separate criminal act or acts.” *People v. Kliner*, 185 Ill. 2d 81, 138 (1998). “To make a *prima facie* showing of a conspiracy, the State must establish that: (i) two or more people intended to commit a crime, (ii) they engaged in a common plan to accomplish this goal, and (iii) an act or acts were done by one or more of them in furtherance of the conspiracy.” *People v. Caraga*, 2018 IL App (1st) 170123, ¶ 37 (citing *Kliner*, 185 Ill. 2d at 138; *People v. Batrez*, 334 Ill. App. 3d 772, 783 (1st Dist. 2002)).

The Court must determine whether there was an agreement between these defendants and others. “Because a conspiracy is almost never susceptible of direct proof, it may be established from circumstantial evidence and inferences drawn from all the surrounding facts and circumstances, including the accused’s own words and acts, coupled with commonsense knowledge of the behavior of persons in similar circumstances.” *Caraga*, 2018 IL App (1st) 170123, ¶ 39 (citing *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 124 (1999)). “Because of the clandestine nature of conspiracy, Illinois courts permit broad inferences to be drawn from the circumstances, acts, and conduct of the parties.” *Batrez*, 334 Ill. App. 3d at 783-84 (citing *People v. Melgoza*, 231 Ill. App. 3d 510, 521).

Regarding co-conspirator statements, for a statement to be admissible under this exception, the statement must somehow further the conspiracy or contribute to the accomplishment of its goal. *Kliner*, 185 Ill. 2d at 141. “Before a co-conspirator’s statement may be admitted into evidence, the State must make a *prima facie* showing that a conspiracy existed

with independent proof of the conspiracy, *i.e.*, proof apart from the co-conspirator's statement sought to be admitted." *Caraga*, 2018 IL App (1st) 170123, ¶ 39 (citing *People v. Coleman*, 399 Ill. App. 3d 1198, 1203 (4th Dist. 2010); *Batrez*, 334 Ill. App. 3d at 783).

For the charge of conspiracy, the State must prove the following propositions beyond a reasonable doubt:

- First: That the defendants agreed with each other and others, to the commission of the offenses of official misconduct and obstruction of justice; **And**
- Second: That the defendant did so with intent that the offenses of official misconduct and obstruction of justice be committed; **And**
- Third: That an act in furtherance of the agreement was performed by any party to the agreement.

For the charge of official misconduct, the State must prove the following propositions beyond a reasonable doubt:

- First: That the defendant was a public officer or public employee; **And**
- Second: That when in his official capacity, the defendant intentionally or recklessly failed to perform a mandatory duty required by law. **Or**
- Second: That when in his official capacity, the defendant knowingly performed an act which he knew he was forbidden by law to perform. **Or**
- Second: That when in his official capacity the defendant performed an act in excess of his lawful authority with intent to obtain a personal advantage for himself or another.

For the charge of obstruction of justice, the State must prove the following propositions beyond a reasonable doubt:

- First: That the defendant knowingly concealed physical evidence; **And**
- Second: That the defendant did so with intent to prevent the apprehension or obstruct the prosecution of Van Dyke. **Or**

First: That the defendant knowingly furnished false information; **And**

Second: That the defendant did so with intent to prevent the apprehension or obstruct the prosecution of Van Dyke.

A person is reckless or acts recklessly when that person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. 720 ILCS 5/4-6 (LEXIS 2018).

SUMMARY OF FACTS

This incident began around 9:57 p.m. near 41st Street and Kildare Avenue when Gaffney and McElligott responded to a call of someone holding a person who was breaking into cars and trucks. Both officers were in full uniform and in a marked police Sport Utility Vehicle (SUV). When the officers first arrived at the scene, they had a brief conversation with Rudy Barillas (hereinafter Barillas), the man who called 911 to report the break-in. Barillas gave them a description and direction of flight for the offender. As the officers began to drive in the given direction, McElligott observed an individual—now known as McDonald—who fit Barillas' description, hiding in the bushes. McElligott got out of his police vehicle and approached McDonald, directing McDonald to show his hands. When McDonald took his hands out of his pockets, he was holding a knife in his right hand. Once McElligott informed Gaffney that McDonald was armed with a knife, Gaffney radioed for assistance and a taser.

McElligott continued to walk near McDonald as he walked on 40th Street heading toward Pulaski Road. McElligott continually directed McDonald to drop the knife. He did this as many as 25 to 30 times, but McDonald refused to comply. McDonald was acting erratically, and at times, held his hand out with his knife, when he turned toward McElligott and Gaffney. Gaffney remained in their squad car, parallel alongside of McElligott. As McDonald approached Karlov Avenue, Gaffney turned his squad car in front of McDonald. McDonald then pierced the right

front passenger tire of the SUV with his knife, deflating the tire, and continued to walk closer to Pulaski Road. Gaffney again turned his squad car in front of McDonald. This time, McDonald looked in Gaffney's direction, took his knife, and stabbed at the passenger side windshield of the squad car. McDonald then continued toward Pulaski Road, taking off in a full sprint. McElligott continued to follow McDonald; however, McDonald went through a Burger King Restaurant parking lot and onto Pulaski Road. At this point, as McElligott was waiting to cross the street, other police units were arriving on scene. McDonald slowed to a walk and continued down the middle of Pulaski Road as police officers continued to arrive and instruct him to drop the knife. Van Dyke and Walsh were Beat 845R. Other police units that arrived on scene included Fontaine and her partner Officer Viramontes (hereinafter Viramontes) Beat 841R, Officers Mondragon (hereinafter Mondragon) and Sebastian (hereinafter Sebastian) Beat 813R, and Officers Bacerra (hereinafter Bacerra) and Velez (hereinafter Velez) Beat 822.

As McDonald continued to walk southbound in the middle of Pulaski Road, Van Dyke and Walsh exited their vehicle. Both officers were in full police uniform and in a marked police SUV. McDonald was ordered to drop the knife numerous times, but he did not. As McDonald continued to walk southbound, he was shot multiple times by Van Dyke. McDonald fell to the ground but continued to move with the knife still in his hand. McDonald did not drop his knife until Walsh was able to kick it out of his hand after McDonald was lying on the ground.

After the shooting, the scene was preserved, and detectives and supervisors were notified. March was the lead detective assigned to this shooting. Upon arriving on scene he interviewed Van Dyke, Walsh, Gaffney, McElligott, Fontaine, Viramontes, Mondragon, Sebastian, Bacerra, and Velez. There was no evidence presented that these officers knew March prior to that date, and some of the officers did not even know each other. In addition, once March realized that

certain officers witnessed what happened, he separated them, and interviewed them independently. Witnesses in Burger King, the adjoining parking lot, and Dunkin' Donuts were located and also interviewed on scene. The detectives also conducted a search for any pod cameras or surveillance cameras from nearby businesses or buildings. An evidence technician was called to the scene to process the scene, take photographs, and collect the evidence. At some point, while Fontaine was taking down the names and star numbers of all the officers at the scene, she observed a few unknown officers in Dunkin' Donuts looking at a laptop and viewing a video which depicted McDonald walking down the street.

All the officers who were on scene were directed to go to Area Central (Area) for further interviews. In addition, the civilian witnesses who were on scene were also brought to the Area for further interviews. March and other detectives conducted follow-up interviews with the on-scene officers and any witnesses that were brought to the Area, including: Alma Benitez, Socorro Falcon, Renato Coss, Andera Calderon-Bautista, Maria Hernandez, and Yolanda Lopez.

As Fontaine arrived at the Area, she observed other 8th District officers sitting in a common area waiting to talk to the detectives. She did not hear them discussing this incident. Van Dyke was not in this group of officers, and no one was speaking about covering up the shooting. When McElligott arrived at the Area, he saw some detectives, but not specifically March, viewing the Dunkin' Donuts video with Walsh and Van Dyke, and he heard an unrecognized voice mention that Walsh had been backpedaling. McElligott only heard them discussing the positioning of the officers on scene.

March also inventoried the evidence, including videos that were recovered from nearby businesses and police vehicles, and, specifically, the squad video that purports to capture Van

Dyke shooting at McDonald. March then sent everything he inventoried to the Illinois State Police Crime Lab—an independent governmental agency—for analysis.

Detectives and Supervisors determined that only Van Dyke, Walsh, and Gaffney were to complete OBRs and TRRs. All three of their OBRs indicate number of officers battered/assaulted was three. The reports for each respective officer contained nearly identical information, despite the fact that the initial contact between Gaffney and McDonald occurred near 41st Street and not on Pulaski Road.

E-mails were sent between Chicago Police Sergeant Anthony Wojcik (hereinafter Wojcik), Chicago Police Sergeant Daniel Gallagher (hereinafter Gallagher), Ron Hosko⁴ (hereinafter Hosko), Thomas McDonagh⁵ (hereinafter McDonagh), and others. All of these emails were sent after the incident, with the first email being sent November 2, 2014. The last email was sent December 5, 2015. The Court has thoroughly reviewed all proffered emails. None of these emails purport to originate from any of these defendants. Only one of the emails was sent to March.

ANALYSIS

A. Allegations of False Statements in Police Reports

First, the State alleges that the officers involved in the McDonald shooting provided false information or made false reports. At trial, the State called Fontaine, who prepared the first police report. In summary, Fontaine's relevant testimony consisted of the following:

While she and her partner, Viramontes, were in their squad car, putting the information that she had gathered into the computer, March came up to their vehicle and requested the RD⁶ number. She had not met March prior to this date and did not know him. Prior to speaking with March, she had not spoken with

⁴ President of the Legal Enforcement Legal Defense Fund.

⁵ Legal Defense Chairman Fraternal Order of Police.

⁶ RD stands for Records Division Number. It is the way the Chicago Police Department identifies incidents with a unique number.

any other officers on the scene about what had just occurred. Once March realized that she and Viramontes witnessed the shooting, he separated them by asking her to step out of her vehicle. She then spoke to March at the front of their vehicle, while Viramontes remained in the vehicle. March had a notepad with him, but she did not recall if he was taking notes. March asked her to tell him what she saw, and she complied. She told March that she saw a male black walking southbound swaying his knife, twisting, and then falling. After she told March what she had seen, she then got back into her vehicle, and March interviewed her partner outside of their vehicle. She could not hear what they were discussing. At this point, she had not viewed any video of the incident.

After March interviewed her partner, she asked March if there was any information that needed to be added in the report. March told her that the category was going to be aggravated assault to a police officer with a knife or cutting instrument. March also provided the officers' names as the victims for the report. She never spoke to Van Dyke, or knew he was hurt, so the information that he was injured by the offender must have come from March, she testified. No one else gave her any information to include in her report. She does not recall if March told her to list McDonald as the offender or if it came from her computer in the squad car, referred to as a Portable Data Terminal, also referred to as PDT.

She never told March that the offender ignored the officers' commands, or raised his right arm toward Van Dyke as if to attack him. It was not until months, or possibly a year later, that she learned that this statement, attributed to her, was in March's report. Once she learned this, she was upset and called her attorney. She never contacted March or any other supervisors to tell them of the error and she never filled out a supplemental report to correct the statement.

Although Fontaine testified at trial that she did not make that statement to March, she later admitted during this trial that she told the Inspector General, under oath, on March 16, 2016, that she did not *recall* making that statement to March. Fontaine also stated during trial that this was a very traumatic event and she had never witnessed someone getting shot before.

She further testified at trial that she did see McDonald with a knife in his right hand, walking southbound, swaying the knife back and forth from left to right and back. Fontaine tried to minimize McDonald's movements and direction during trial, however, she admitted that she

told FBI agents and personnel from the State's Attorney's Office on January 8, 2015, under oath that she saw the offender moving closer to the officer waving the knife while being told to put it down, but he did not comply. She also admitted that she told the Inspector General under oath, on March 16, 2016 that she saw McDonald make attacking movements towards Van Dyke. She admitted that she also told the Inspector General that McDonald was walking southbound swaying the knife. She stated under oath, on March 16, 2016, that from her perspective, which she called the "angle," McDonald was walking southbound; it seemed to her as if McDonald was walking towards Van Dyke and Walsh. She admitted that on January 8, 2015, she told the FBI agents and personnel from the State's Attorney's Office, that she saw McDonald moving closer to the officers, while still waving the knife—despite being told to put it down—but he did not comply. She also admitted that she testified in the Federal Grand Jury on June 24, 2015, under oath, that McDonald "was kind of going back and forth, swaying, so he was coming towards their direction." She testified further that she did see McDonald face east which was in the direction of Van Dyke and Walsh and he faced them as he twisted. Fontaine testified at trial that McDonald was merely walking southbound; however, her statement from the GPR indicates that she told March that McDonald was walking sideways with his body facing east toward Van Dyke and Walsh. Even Viramontes' statement from the GPR indicated that Viramontes told March that McDonald ignored verbal direction and turned toward Van Dyke and Walsh.

The Defense also elicited testimony from Fontaine that, after arriving on the scene of the incident, as she was getting out of her vehicle, she tripped and did not see what McDonald did or did not do immediately prior to being shot. She did not see the first shot.

As stated above, Fontaine was impeached regarding whether McDonald walked in the direction of the officers. This Court finds that Fontaine was trying to minimize what happened

regarding this issue during her testimony at trial. She admitted that she stated under oath not once, but three times, that it seemed to her as if McDonald was walking towards Van Dyke and Walsh, or that he was walking closer to the officers. Additionally, Fontaine testified that even while watching the video with March, he only asked questions to verify positions. She admitted that he never suggested answers to her or told her what to say.

Fontaine admitted during her testimony that, when she first saw McDonald, he appeared to be dazed, or possibly on some kind of drugs. In addition, she testified during this trial that McDonald was an armed assailant and that as long as he had the knife, he was a threat, and Fontaine admitted she had her hand on her gun.

Fontaine testified that there is only one sentence in the GPR that is attributed to her which is false. She did not state that any other part of that GPR is false. She did not deny that she told March the rest of the sentence in question. She only denied the part that stated McDonald raised his hand. She admitted at trial that she interpreted the statement to mean that he had raised his hand over his shoulder and that was why she was upset about this statement in the report.

Fontaine also testified at trial that the perspective of the video from 813R is very different from the perspective that she and her partner had, and that Walsh and Van Dyke had a different vantage point or line of sight than she had of McDonald.

Although Fontaine denied making the aforementioned statement to March, the court finds that her trial testimony regarding this issue is not credible. At trial Fontaine admitted stating to the Inspector General under oath on March 16, 2016, that she did not *recall* making that statement. There is a substantial distinction between claiming that you did not make a statement, on the one hand, and, on the other, not recalling whether you made a statement. Moreover, there were several inconsistencies in her testimony at trial. Based upon her trial testimony regarding

this issue, her credibility is called into question. The Court does find that Fontaine told March that McDonald did raise his right arm towards Van Dyke, as if attacking him.

Additionally, various GPRs and statements in March's supplemental reports attributed to other on-scene officers—who had a similar vantage point as Van Dyke and Walsh—corroborate Fontaine having made this statement to March. The GPR and statement attributed to her partner Viramontes state that Viramontes told March that McDonald ignored police commands, turned toward Van Dyke and Walsh, and Van Dyke then fired multiple times. Sebastian's statements from the GPR and supplemental report indicate that Sebastian told March that McDonald ignored directions and continued to advance on the officers while waving the knife. Mondragon's statements from the GPR and supplemental report indicate that Mondragon told March that she heard the officers repeatedly ordering McDonald to drop the knife as McDonald got closer to the officers as he continued to wave the knife. Velez's statements in the GPR and supplemental report indicate Velez told March that she saw McDonald holding a shiny object in his right hand and saw McDonald waving the object in the air.

Moreover, the State has failed to prove beyond a reasonable doubt that statements attributed to Walsh in March's supplemental report are false. Those statements claim that "at 12-15 feet O swung knife at PO V in aggressive manner," "VD continued firing as O continued moving, attempting to get up, still armed with knife," and "when McDonald got to within 12-15 feet of the officers he swung the knife toward the officers in an aggressive manner." There is no video from the vantage point of Walsh. The State argues that these statements are false because the actions described in the statements are not depicted in the video. However, the video has a vantage point from a completely different angle than Walsh and only shows the back of McDonald. The video does not show the front or side of McDonald until after the first shot is

fired. However, the video does show McDonald moving while lying on the ground and Walsh kicking the knife out of McDonald's hand. These actions by McDonald do not show beyond a reasonable doubt that the statements are false, that Walsh provided false information to March, or that March intentionally or recklessly included false information in his report. Viramontes' statements from the GPR corroborate this as well. His GPR indicates that he said McDonald fell to the ground but continued to move, attempting to get back up with the knife still in hand. Sebastian's statements also indicate that she told March she heard multiple gunshots and saw McDonald fall to the ground, where he continued to move. The Court notes that none of these witnesses denied making these statements to March. The officers who had a vantage point similar to Van Dyke and Walsh correspondingly described the actions of McDonald, which cannot be seen on the video.

The State additionally claims that the conspiracy is further demonstrated by the Medical Examiner investigative report prepared by Earl Briggs. Briggs testified that he spoke to a person who identified himself as March and gave March's star number, and a summary of the incident. Before making his report, Briggs asked March if he wanted anything added or deleted, and confirmed the contents of the report with March. Briggs claimed that March told him that McDonald "lunged" at the officers with a knife. In reviewing all the exhibits and testimony in this case, not a single witness described McDonald's actions as "lunging" at the police. This one word in a medical examiner investigative report does not show beyond a reasonable doubt any agreement, implied or otherwise, to include false information in a report in an effort to prevent further investigation or possible prosecution of Van Dyke. The word lunge is not contained in any reports or GPRs prepared by March. Common sense dictates that if March were trying to put false information in reports to prevent further investigation or possible prosecution of Van

Dyke, he would have included this word elsewhere in other reports. Even if March said the word lunge to Briggs, this does not rise to proof beyond a reasonable doubt as to official misconduct or obstruction of justice. At best, it would be one word used one time in one report that is not prepared or reviewed by March.

B. Categorizing the Officers as Victims and McDonald as an Offender

On the night of the incident, McDonald: (1) was armed with a knife; (2) refused to drop the knife despite numerous commands to do so; (3) was within 10 to 15 feet of McElligott at times; (4) forcefully punctured the tire of a marked police SUV; (5) stabbed at the windshield of the marked SUV that turned in front of him; (6) continued to run toward a populated area and again refused to drop the knife after numerous commands to do so; and (7) continued to walk in the direction of uniformed police officers with the knife in his hand, swinging the knife back and forth in front of him. March included McElligott as a victim in his reports.

McElligott testified at trial that he only spoke to March at the scene of the incident and had not spoken to or met him before that day. McElligott also testified that he was apprehensive, alert, and a little fearful based upon McDonald's behavior and actions. Furthermore, McElligott testified that he and Gaffney called for back-up because it was a dangerous situation and was more than they could handle on their own. He testified McDonald was a threat and that when McDonald disabled their police vehicle, it raised the threat level.

McElligott testified that after discussion with detectives and supervisors, it was decided by the detectives and supervisors that he should not complete an OBR or TRR because he was not in the vehicle at the time McDonald pierced the tire or stabbed at the windshield. He further testified that it is not an unusual practice for detectives to discuss or decide who should fill out the appropriate paperwork.

In addition, the State's own witness, Chicago Police Sergeant Larry Snelling (hereinafter Snelling), testified that simply because an officer is in the vehicle and has protection of the vehicle does not mean that he cannot categorize the subject as an assailant. Snelling further testified that if a subject is moving toward a vehicle with a knife in hand and the officer feels that an attack is imminent—even though he is behind protection—the officer can categorize the subject as an assailant. Snelling also testified that, to categorize the subject as an assailant, all the officer has to do is reasonably believe that an attack or something of that nature is imminent. It is clear from the testimony in this case that an officer could reasonably believe that an attack was imminent based upon McDonald's actions, which were fluid and could be categorized differently from an active resister to an armed assailant in a split second.

The State argued that because Van Dyke and Walsh got out of their vehicle and approached McDonald that they did not reasonably believe that an attack was imminent. However, only the officers involved in the incident know what their belief was at the time of the incident. We cannot now view the actions of the officers with the benefit of hindsight as to what they should have believed. It is undisputed and undeniable that McDonald was an armed offender who ignored verbal commands to drop his knife for several blocks and continued to approach a more populous area. The mental state of the officer is nothing more than speculation on the part of the State. It is equally probable that the officer viewed him as an armed assailant.

The original incident report submitted by March noted that “McDonald committed aggravated assaults against three officers, finally forcing VD, in defense of his life, to shoot and kill McDonald.” March prepared his report based upon information given to him. Even Snelling testified that McDonald was an active assailant at times. In addition, Snelling’s opinion was

based solely upon viewing the video which was recorded from a single vantage point. Snelling further testified that his opinion might differ if he had additional information.

Whether McElligott or any of the officers were the victim of an aggravated assault is not at issue. This Court is asked to determine whether the officers were falsely listed as victims as part of a conspiracy, or whether their being listed as victims amounts to proof beyond a reasonable doubt of official misconduct and obstruction of justice. Based upon the testimony heard at trial and contained in the exhibits, this Court cannot say beyond a reasonable doubt that listing the officers as victims was a falsehood or was done as part of a conspiracy to prevent further investigation or possible prosecution of Van Dyke.

March's supplemental report (People's Exhibit March Case Supp. 2) states in summary that, after viewing the recovered in-camera videos from Beats 845R and 813R, those videos are consistent with the accounts of all the witnesses who observed the incident. In reviewing the GPRs and the statements of the officers and witnesses who were on scene and had similar vantage points as Walsh and Van Dyke, they all gave a similar description of the events and McDonald's actions. This Court has previously stated that the State has not met its burden in proving that these statements were fabricated by March or anyone else involved in this investigation. That being said, it is not as simple as looking at the reports in comparison to what is depicted on the video. To do so would diminish the Court's duty to look at and consider all the evidence and testimony, and to apply the law to the facts; it would imply that this Court should only consider a portion of the evidence and disregard the totality of the evidence and circumstances or the intent of the defendants charged.

It has been established that the recovered videos do not show the vantage point of Van Dyke, Walsh, or others who were either facing or to the side of McDonald. It is borne out in the

video that McDonald continued to move with the knife in his hand after he fell to the ground. The statements in the GPRs and supplemental reports are consistent with the video in that regard. The video also depicts McDonald walking toward the officers, at times, and McDonald appears to be walking at an angle from the vantage point of the video. However, as previously stated, multiple people, including Fontaine in her testimony to the FBI, Inspector General, and the Federal Grand Jury, indicated that it appeared that McDonald was walking in the direction of the officers. March's statement in his report is that the videos are consistent with, not identical to, the accounts by the witnesses. March is the one who inventoried the videos so that they were available for further viewing. Merely including in his report that the videos are consistent with witness statements does not make it false or otherwise show that he is trying to prevent further investigation. This is not proof of a conspiracy, official misconduct or obstruction of justice beyond a reasonable doubt. It is nothing more than speculation.

March prepared his reports based upon the information that he had from the individuals at the scene. Those individuals told March of McDonald's actions leading up to, and at the time of, the shooting. In his report March included a concluding paragraph regarding the investigation being closed and the reasons why. This paragraph was based upon the information that he had over the course of his investigation. In looking at the statements from the officers who had a similar vantage point as Van Dyke and Walsh, the State has not met its burden in proving that this paragraph is either false, was included recklessly, or that it tends to prove a conspiracy.

C. Improperly Completing OBRs and TRRs

The State argues that all three defendants, Van Dyke, and others violated the Rules and Regulations, General Orders, and Special Orders of the Chicago Police Department by improperly completing their OBRs and TRRs. More specifically, the State argues that the OBRs

and TRRs of Van Dyke, Walsh, and Gaffney contain incorrect or false information, and were improperly completed. Snelling testified that, because the contact between Gaffney and McDonald was at a different location, Gaffney should only have included his information in the report. Snelling further testified that because Gaffney did not use force, he should not have completed the reports. However, Snelling also said that Gaffney could categorize McDonald as an assailant. As such, Gaffney could be the victim of an assault. In order to complete a TRR for the actions of McDonald during an assault, Gaffney would first have to fill out an OBR. The question is whether these officers intentionally or recklessly completed these forms with false information. The State argues that the information in the reports is false because it is in conflict with the video and because they were filled out with almost identical information. Two people, with two different vantage points, can witness the same event but describe it differently; this does not necessarily mean that one of them is lying. Rather, it could be an indication that they are describing what they saw from their vantage point, with their own perceptions. In contrast, people who view the same incident can also describe the event similarly. As before, this does not mean that if they do this they are lying. The officers saw the same incident, so it would be expected that their various recollections of what happened should be similar, such as each including in their report that McDonald was swinging the knife. Additionally, the testimony at trial indicated that McDonald was either swinging or displaying the knife at both locations. No one testified that they heard anyone telling the officers what to put in their reports or how they should word anything.

Although Walsh and Van Dyke viewed the video with detectives and supervisors, according to McElligott's testimony, McElligott never heard them discussing putting the same information in their reports. It is not unusual that the officers would include the same or similar

information in their respective reports, especially Walsh and Van Dyke, who observed the same or similar actions by McDonald from the same vantage point. In addition, the OBR and TRR are essentially summary reports with either boxes to be checked or a blank for “other.” The details of the officers’ statements about the incident are contained in the GPR and the detective supplemental report. Despite being written as a summary, these reports are much more detailed. Looking at all the reports together, the officers were able to accurately detail the events of that evening. This does not equate to false reports, misleading information, an attempt to conceal, hide or be misrepresented, or an attempt to avoid detection and apprehension by law enforcement authorities.

The Court also heard testimony from McElligott that detectives and supervisors discussed who should fill out the report. This is important because, although the State argued that Gaffney never should have filled out a report, according to McElligott, McElligott was told not to complete a report because he was not in the vehicle at the time of the attack on the police vehicle. In addition, the reports were reviewed by three separate supervisors prior to being approved. Snelling testified that if he had reviewed the report of Gaffney, he would have had him correct the number of officers battered or assaulted. It should be noted that Snelling made it clear to the Court during his testimony that his opinion that the reports should have been filled out differently—regarding whether or not McDonald was an assailant or an armed assailant, whether or not he used force likely to cause death or great bodily harm, or whether he fled—was based upon his view of the video from 813R, which he admitted had limitations. Although Snelling also viewed the Greater Chicago Food Depository video, it did not show McDonald puncturing the tire or stabbing at the windshield.⁷

⁷ Snelling additionally reviewed the radio transmissions that occurred during this incident.

Furthermore, there was no testimony at trial that any of the officers were told to correct their reports but either failed or refused to do so. A person cannot correct a report that he believes to be accurate or that he is not told to correct. The fact that the officers did not make changes to the report does not, in any way, shape, or form, prove beyond a reasonable doubt that they either included false information in their reports, recklessly filled out their reports, failed to correct their reports, or that there was any agreement or act in furtherance of an agreement to incorrectly complete these reports. Even if there are errors in the reports, they do not rise to the level of substantiating the officers knowingly making a false report, nor do they prove evidence of a conspiracy or a criminal act. The State must prove the intent of the defendants beyond a reasonable doubt and the evidence in this case falls short of that burden.

D. Failure to Locate, Identify, or Interview Witnesses

Next, the State alleges that all three defendants and others failed to locate, identify, or interview witnesses, or to ensure the location, identification, or interviewing of the witnesses to the fatal shooting of McDonald. The State argues this includes Witnesses A, B, and C, who did not testify at trial, and whose information was inconsistent with accounts of Chicago Police Department members. The only witness who testified at trial regarding this issue was Jose Torres (hereinafter Torres). Although Torres testified that he was directed to leave the scene by an officer, he admitted that he never told that officer that he witnessed what happened. Torres never contacted the police department later that night, the next day, or at *any* point until he testified. Moreover, he did not contact any investigative authority until several days after the shooting to let them know that he was present and saw what happened. Torres admitted at trial that after the shooting an unknown officer directed the car in front of him to make a u-turn and then directed him to make a u-turn to leave the area. There is no testimony that this officer, or

any other officer for that matter, knew that he was an eye witness and consequently directed him to leave the area.

Furthermore, it cannot be said that Torres' account of what he saw is inconsistent with the accounts of the officers who were on scene. He testified that he saw a person now known as McDonald walking in the middle of Pulaski Road. This testimony is consistent with most, if not all, of the officers at the scene. Despite the fact that Torres testified he was only two car lengths away from the incident, he testified that he did not see anything in McDonald's hands. Torres heard the police yelling something to McDonald but again, despite his close proximity, he could not tell what they were yelling. Torres further testified that he saw McDonald turn his head in the police officers' direction and then continued to walk away. Torres testified that it was readily apparent that McDonald was not moving in a normal way. This testimony is consistent with statements from other witness at the scene.

Torres stated that as soon as he saw McDonald turn his head to look at the officers, shortly after that he heard gunshots. However, Torres did not see who was shooting. This testimony is also consistent with statements included in the GPRs of Viramontes, Sebastian, and Fontaine. Torres also testified that after McDonald fell to the ground, he saw McDonald move; as soon as McDonald started moving, then Torres heard all of the other shots being fired. This is similarly consistent with the GPR of Viramontes. Although Torres testified that he was only two car lengths behind what he now knows to be Van Dyke's vehicle, he also testified that he was in front of Focal Point⁸. The court did not hear testimony regarding the distance from Focal Point to where Van Dyke and Walsh's vehicle was parked, but the fact that he could not see what was in McDonald's hand or that he could not hear what the police officers were yelling indicates to

⁸ Focal Point is a business located at 4141 South Pulaski Road, just south of Dunkin' Donuts.

the court that he was further away than two car lengths. It should also be noted that Torres viewed this incident through his car window—either the windshield or the side window.

Additionally, not only are there GPRs regarding witness interviews of citizens who were at Dunkin' Donuts, Burger King, or in the Burger King parking lot, but there are also summaries of these interviews and identifying information contained in these reports, as well. These witnesses were not only interviewed at the scene, but they were also directed to Area Central for further interviews. There were at least three or four witnesses who subsequently went to Area Central but refused to stay and were driven home. One of these witness, Alma Benitez, who did not see who fired the shots, gave a statement that she attempted to record the incident, but was unable to. Investigating officers subsequently viewed her phone but discovered she had not successfully recorded anything. Further, in March's supplemental report, he indicated that assigned personnel later became aware of an article written by Craig Futterman regarding an unknown witness (now known as Torres) to this incident. Futterman was consequently contacted so that Torres could be interviewed. Rather than provide Torres' contact information to the detectives, Futterman stated that the witness had already been interviewed by Independent Police Review Authority (IPRA) and he did not know if the witness would be willing to be interviewed by the Chicago Police Department. Per the report, Futterman agreed to give the witness the contact information for the detectives. Torres did speak to reporter Jamie Kalvin, IPRA, and attorneys for the McDonald family. After the Van Dyke trial, Torres additionally went to the scene of the shooting with a reporter for the Chicago Tribune and had pictures taken in front of Focal Point. At no point did Torres reach out to the investigating detectives on this case. As such, the State has failed to meet their burden regarding this allegation.

Next, the Court will address the allegation that all three defendants (and others) failed to locate, identify, and preserve physical evidence, or to ensure the location, identification, and preservation of physical evidence, including video and photographic evidence. McElligott testified that not only did he walk the scene with detectives, but he also went to surrounding businesses to see if they had any working surveillance cameras or videos. They also looked for any pod cameras that might be in the area. In addition, testimony was elicited at trial that an evidence technician was called to the scene to process the scene by taking pictures or video and collecting evidence. In March's supplemental report, March indicates that assigned personnel became aware of a potential question regarding the integrity of the video recovered from Burger King. Per the report, March and detectives followed up and went to Burger King on March 11, 2015. March inventoried evidence in this case, including the videos. Finally, Gallagher requested that all the reports and GPRs regarding the aggravated assault be placed in a permanent retention file, even though this is usually only done in homicide investigations. There has been no testimony or evidence presented to show that any of the defendants or others failed to locate or preserve physical evidence. In fact, the evidence shows just the opposite. Due to March's efforts, much of this evidence, including the police video—the one piece of evidence critically relied upon in the prosecution of Van Dyke—was preserved that very night.

E. Improper Categorization

The State argued that March improperly had the original case report categorized as an aggravated assault (upon a police officer with a knife or cutting instrument), rather than a homicide. There was no credible testimony elicited that this is a false categorization. Although there was testimony that the contact between the officers and McDonald at 40th Street and Kildare Avenue is separate from the contact between the officers and McDonald on Pulaski

Road, it is clear that one incident flowed into the other and that they were intertwined. Based upon the evidence presented, this Court cannot say beyond a reasonable doubt that categorizing the incident as an aggravated assault is false. In addition, both the aggravated assault report and the justifiable homicide reports reference each other. If there was some grand scheme to include false information in the reports or to put the wrong category for the incident, these reports would not reference each other. This indicates to the Court that there was no intent to include false information or to recklessly categorize these incidents in order to prevent further investigation or possible prosecution of Van Dyke.

F. Hiding, Misrepresenting, and Concealing the Activities of the Conspiracy

Regarding the State's allegation that all three defendants, Van Dyke, and others used means to misrepresent, conceal, and hide, and to cause to be misrepresented, concealed, and hidden the activities of the conspiracy, and to avoid detection and apprehension by law enforcement authorities, the same reasoning as above applies. There was no evidence introduced at trial, or elicited through testimony, that supports this assertion. As such, the State has failed to meet its burden for this allegation.

G. Failure to Preserve Communications

The State next alleges that all three defendants, Van Dyke, and others deleted or failed to preserve communications with each other concerning, and during the activities of the conspiracy. This court has not heard any testimony elicited at trial nor seen any evidence introduced regarding this assertion. The State apparently abandoned this issue by not referring to this issue during arguments, and appropriately so, as they presented no evidence at trial on this issue. Therefore the State has failed to meet its burden for this allegation.

H. Emails in Furtherance of the Conspiracy

Finally, the State argues that various emails between Wojcik, Gallagher, Hosko, McDonagh, and others are further proof of the conspiracy. Only one of these emails is to any of the defendants in this case. No emails were sent from any of the defendants. Additionally, even if these emails concern possible issues regarding Van Dyke, they are speculation, at best, as to a conspiracy. The proffered emails certainly do not rise to the level of proof beyond a reasonable doubt, even if coupled with all the other evidence in this case. This court has found that the State did not prove beyond a reasonable doubt that there was an agreement between any of these defendants or others, or any act in furtherance of the agreement. As such, the Court finds there was no conspiracy, and the emails are therefore irrelevant.

CONCLUSION

The crux of this case rises and falls on whether the information that the officers, including March, put in their reports, or told to March, was false and if so, was it done to prevent Van Dyke from further investigation or prosecution. For the reasons stated above, this Court finds that the State has failed to meet its burden on all charges. Therefore, there is a finding of not guilty—as to every count and each defendant—of conspiracy, official misconduct, and obstruction of justice.

ENTERED

Judge Domenica A. Stephenson
Circuit Court of Cook County
Criminal Division

DATED: 1-17-19.

